

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2543

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT L. CARDILLO,

Plaintiff-Appellant,

-against-

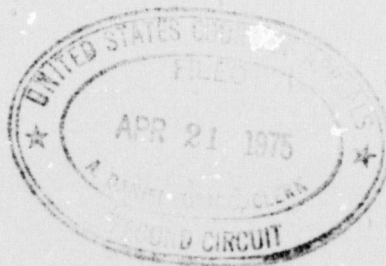
DOUBLEDAY & COMPANY, INC., THOMAS
C. RENNER, VINCENT TERESA, AND
FAWCETT PUBLICATIONS, INC., d/h/a
TRUE MAGAZINE,

Defendants-Appellees. :
----- -X

Docket No. 74-2543

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT
ROBERT L. CARDILLO



NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL

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APPEAL FROM THE UNITED STATES DISTRICT
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NEW YORK

REPLY BRIEF

PRELIMINARY STATEMENT

Plaintiff Robert L. Cardillo ("plaintiff") submits this Reply Brief to answer the single brief submitted by the four defendants-appellees (jointly "defendants") and in further support of his position that the summary judgment granted by the

court below should be vacated and this case remanded for proceedings in light of the majority opinion in Gertz v. Welch, 418 U.S. 323 (1974).

In this Reply Brief, we shall (i) speak of the issue on appeal, (ii) comment on some of the material appearing in defendants' brief under the heading "Facts" (D. br. 3-15*) and then (iii) show that this case is not ripe for a final decision in this Court and that defendants' arguments that the judgment should be affirmed without remand are not well taken.

The Issue On Appeal

The core issue in this case remains: should this Court remand the case to the District Court for further proceedings in light of Gertz v. Welch?

We submit that defendants should not impose on this Court the burden of a de novo decision under Constitutional standards established subsequent to the decision made by the District Court and on an incomplete and misfocused record.

*The abbreviation "D. br." stands for defendants' brief on appeal to this Court; the letter "S." refers to the Supplemental Joint Appendix. Our main brief is noted by the abbreviation "M. br." Emphasis in quotes is supplied throughout.

Comments on Defendants' "Facts"

We begin with the generalization that defendants have continued, in their recital of the "Facts", to parade the generalizations they gave to the District Court. There is a pretense at specification, without specification. There is no pinpointing of any alleged substantiation for the 15 passages that plaintiff has claimed to be libelous ("the 15 offending passages") in the book, My Life in the Mafia. The process for defendants remains one of avoiding candid observations about truths that appear only upon analysis of the record they made. Those truths are:

(i) The only real support for the 15 offending passages is the word of defendant Vincent Teresa ("Teresa"), the self-acknowledged criminal and perjurer.

(ii) The various "discussions" and verification procedures must have focused very little on plaintiff (he was only one of many people accused of criminal activity in Teresa's book).

(iii) No one obviously focused on the 15 offending passages prior to the bringing of this lawsuit by plaintiff.

The "Facts" section of defendants' brief is an unreliable guide to the record.

The "extensive discovery" that defendants proclaim at page 4 of their brief was not the kind of gutsy discovery

that all trial lawyers know is essential to the presentation of a case: there were no depositions taken; there was no documentary discovery. For defendants to list the two sets of interrogatories propounded to co-author Thomas C. Renner ("Renner") among the "extensive discovery" had by plaintiff is strange. As they admit almost without breath, Renner never answered those interrogatories (D. br. 4). And, as we pointed out in our main brief, those two sets contained the interrogatories that would have forced defendants to specify what they did to verify the statements made in the 15 offending passages (M. br. p. 9). Indeed, the job of counsel on this appeal and of this Court would have been made much easier had the interrogatories been answered.

At the top of page 5 of their brief, defendants claim that the statements in the 15 offending passages concern activities that led to plaintiff's "arrest and conviction". That claim is nowhere proved; at least, we cannot see where it is proved, and defendants' vague citation of "(See infra.)" is in the realm of self-parody.

Defendants say -- also on page 5 -- that "the basis" for their motion for summary judgment in the District Court was that the publications "were all of legitimate public interest and concerning a public figure***." That is an amazing claim.

The statement of the grounds for summary judgment made by defendants in the court below eschewed the characterization of plaintiff as a "public figure". The motion -- in the area of New York Times Co. v. Sullivan doctrine -- was made and argued solely on the basis that "the publications which are alleged to be libelous are of legitimate public interest (S. 3)." The District Court was nowhere asked to find that plaintiff was a "public figure." This case was argued by defendants only on the plurality view of the Supreme Court of the United States in Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971).

At page 6 of their brief, defendants maintain that they submitted an affidavit of Teresa and in a footnote tell us, however, "that Teresa did not verify his affidavit in the normal manner***." Teresa did not verify an affidavit in any manner -- not just not in the normal manner. At least, he did not verify in the sense that we lawyers speak of verifying. All this record shows is that Teresa told someone -- nowhere identified -- "that he believes" an unsworn affidavit with his name on it to be true (S. 104).

In a footnote on page 7, defendants say that plaintiff ignored Rules 24 and 25 of the Federal Rules of Appellate Procedure and therefore this Court should not have ordered

an in forma pauperis appeal. They say that, as a result, the appeal should be dismissed.

The record does not disclose how it was that this Court ordered an appeal in forma pauperis. Suffice it to say that the Court issued an order and that is the rule of law in this case. Assuming that Rules 24 and 25 were not abided by, the Court had the power to overlook any irregularity, for a motion or order granting leave to appeal in forma pauperis is not jurisdictional. See Gerringer v. United States, 213 F.2d 346 (D.C. Cir. 1954); West v. United States, 222 F.2d 774 (D.C. Cir. 1955). If error there was, defendants' remedy was a timely motion to vacate -- not an argument to dismiss after counsel had been assigned and done his work. Moreover, while we hope that defendants will be prejudiced by the order -- in the sense that we, as counsel, have made arguments that require reversal -- defendants cannot be prejudiced in the legal sense because we are certain that upon proper papers the incarcerated plaintiff would have been granted leave to appeal in forma pauperis.

At page 8, defendants' brief states that defendant Renner in his affidavit "has outlined the substantiation for each of the alleged libelous statements." Defendants' citation is to an affidavit in the record (S. 96-100) that

we analyzed at pages 10 through 13 of our main brief. As we observed there, Renner's affidavit in no way keys itself to the 15 offending passages. Only if a flow of ungeared generalizations is considered "outlining" is defendants' statement here accurate.

Defendants tell us, on the bottom of page 8 of their brief: "Documentary evidence is also available to show that many of these [libelous] statements are true***." The citations given by defendants here are to the Renner affidavit as a whole (S. 93-100), plaintiff's record of arrests and convictions as a whole, answers to interrogatories as a whole, selections from hearings of a select committee on crime of the House of Representatives as a whole, an FBI report as a whole and a report "concerning the Polaroid investigation" as a whole (S. 31 - 77). We believe that there is a reason for this maddening type of dump citation. The claimed support for the Teresa-Renner statements in the 15 offending passages is not there -- or very little of it is there.

On page 10 of their brief, defendants imply -- they dare not say -- that various specialist in the field of organized crime reviewed the Teresa-Renner manuscript and verified what was said about plaintiff. A careful look at those

affidavits reveals that there was not much focusing on plaintiff by these experts and surely no focusing on the 15 offending passages with which the Court is concerned (S. 129 - 132).

Finally, defendants' brief tells us -- at page 11 -- that Doubleday's attorneys discussed the manuscript with Renner. The brief would lead us to believe that the 15 offending passages were actually discussed ("the potentially libelous statements"). But no such claim is supported by the record. The affidavits on those discussions with counsel slip away to generalizations (S. 9, 86, 98). In fact, we don't know what was discussed with counsel, what was viewed by them and what was "reviewed" by them. What we do know is that the publishers were worried by, and alerted to, the danger of libel and knew they needed to substantiate what was said about plaintiff and others.

ARGUMENT

GERTZ v. WELCH REQUIRES A REMAND OF THIS CASE: (i) NEW YORK LIBEL LAW DOES ADHERE TO THE CONSTITUTIONAL LIMITS SET OUT BY THE SUPREME COURT; (ii) THE MIXED ISSUE OF LAW AND FACT ON WHETHER PLAINTIFF IS A "PUBLIC FIGURE" SHOULD BE RESOLVED BY THE DISTRICT COURT; (iii) THERE ARE UNRESOLVED ISSUES OF FACT IN REGARD TO ALL DEFENDANTS' ALLEGED NEGLIGENCE AND MALICE; (iv) PLAINTIFF IS NOT "LIBEL PROOF" AS A MATTER OF LAW; (v) SUMMARY JUDGMENT IS NOT "PARTICULARLY APPROPRIATE" IN THIS CASE.

As we noted in our main brief and as defendants concede, Gertz v. Welch rejected the Constitutional test of the plurality opinion of Justice Brennan in Rosenbloom v. Metromedia, Inc.: It is now the character of the plaintiff as either a "public official" or a "public figure" that determines whether the "actual malice" doctrine of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), is required by the First Amendment -- not whether the subject matter of the libel was of "general or public interest". Yet it was this Rosenbloom test of a "general or public interest" that was used by the District Court to determine that plaintiff could not recover in this case. For that reason alone, as we observed in our main brief, this case should be remanded for redetermination by the District Court in line with the usual practice (M. br. 18).

We went further in our main brief to show that the District Court was faced with quite a few mixed questions of law and fact to decide (M. br. 18-26):

First, the District Court would have to adjudge whether plaintiff should be classified a "public figure".

Second, if he was not a "public figure", the District Court has to apply a negligence test and that would certainly mean a denial of summary judgment.

Third, even if a malice test were to be used, the present record does not dispel all fair inferences that defendants acted either with knowledge of the falsity of the 15 offending passages or in disregard of whether they were true or not.

On all these points we showed plaintiff had the better of the argument against summary judgment on the present record. Crucial interrogatories had not been answered. They were crucial because defendants had avoided dealing specifically with the 15 offending passages in their motion papers. The hodge-podge of generalizations cried out for cross-examination. The inference was, from defendants' papers, that the authors and publishers were, at best, callous -- "safe in the knowledge that accused Mafiosi and convicts don't ordinarily sue for libel (M. br. p. 26)".

Defendants have made five counter-arguments. We deal with each in the order defendants have presented them.

The "Public-Interest" Test and the True Law of New York*

Defendants first point out that Gertz did not require that the states abrogate the "public interest" test, but left them free to maintain it voluntarily (D. br. 18). It is defendants' next proposition that New York State will continue to adhere, as a matter of state policy, to the "public interest" test (D. br. 20-24). Thus they conclude that a "private" plaintiff in New York must still establish malice on the part of the defendants if the matter involved in the alleged libel is one of public interest (D. br. 25-26).

While the initial premise of defendants' argument -- their interpretation of Gertz -- is clearly correct, their next proposition and their conclusion are clearly wrong.

For over a century and a half, New York followed the accepted rule of the common law that liability for false statements detrimental to a person's reputation requires no showing of intent to injure or even negligence. This rule was grounded in a recognition of the importance of protecting the individual from such serious injuries as may flow from statements bandied about without factual basis. Thus, whether the person injured was a private individual or a public official, under New York law he was entitled to the full protection afforded by the rule of

* Answering Point I of defendants' brief (pp. 17-25).

strict liability for defamatory statements. See, e.g., Cheatum v. Wehle, 5 N.Y.2d 585, 591 (1959); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64 (1920); Polakoff v. Hill, 261 App. Div. 777, 780-81, 27 N.Y.S.2d 142, 146 (1st Dep't 1941); Sacco v. Herald Statesman, Inc., 32 Misc. 2d 739, 223 N.Y.S.2d 329 (Sup.Ct. West. Co. 1961).

The first breach in New York's protective wall was made directly and only by the Supreme Court's decision in New York Times Co. v. Sullivan, supra. That case held that First Amendment considerations of free speech and press required that an allegedly defamed public official must establish acts of "malice" on the part of defendants. Subsequent Supreme Court majorities extended this rule to "public figures" [Butts v. Curtis Publishing Co., 388 U.S. 130 (1967)], people involved in events of public interest whose privacy had been invaded [Time, Inc. v. Hill, 385 U.S. 374 (1967)] and, finally, defamed private individuals involved in events of public interest. Rosenbloom v. Metromedia, Inc., supra.

But in line with the established value of protecting individuals, the New York Court of Appeals, since the decision in New York Times v. Sullivan, has gone only as far as the Supreme Court opened a breach in the wall.

It has consistently refused to go beyond the high court's narrow holdings and authorize a broader use of the malice test. Thus, shortly after the decision in New York Times v. Sullivan -- holding that malice must be established in the case of a libeled public official -- the Court of Appeals held that this standard should not be applied in the case of a plaintiff who, though not a public official, was clearly a public figure. Faulk v. Aware, Inc., 14 N.Y.2d 954 (1964), amending remittitur, 14 N.Y.2d 899 (1964) (plaintiff was a radio and T.V. artist and officer of AFTRA; held: New York Times, supra, not applicable).

Similarly, two years later in an analogous case the New York Court of Appeals again declined to apply Times v. Sullivan to a plaintiff who clearly was a public figure, holding again that that case was limited to coverage of public officials. See Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 329 (1966) (privacy statute). It was only under the compulsion of the Supreme Court's subsequent decision in Time, Inc. v. Hill -- "the gun" of it -- that the Court of Appeals, on remand from the Supreme Court, held that the privacy statute applied to public figures by merely adopting the rationale of Time, Inc. v. Hill. See Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 126-127 (1967).

Thus it is not surprising that it was only after the decision of the Supreme Court in Rosenbloom v. Metro-media, Inc. in 1971 that the New York Court of Appeals held that a malice standard is to be invoked in cases in which allegedly libelous utterances concern matters of general public interest. See Frink v. McEldowney, 29 N.Y. 2d 720 (1971); Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N.Y. 2d 595 (1972); Trails West, Inc. v. Wolfe, 32 N.Y.2d 207 (1973). In all these cases, the Court relied simply on Rosenbloom. No reference at all was made to any non-Constitutional or independent state rule.

It follows that Gertz's elimination of the Rosenbloom requirement that malice be established in cases involving issues of public interest necessarily means that the decisional law of the New York Court of Appeals prior to Rosenbloom governs. The traditional protection of private individual reputation by the New York courts is again the guide -- limited only by the Gertz requirement that the states must adopt a fault principle of some kind.

Defendants cite a number of pre-Rosenbloom lower court New York cases as support for their argument that New

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York developed a state rule of malice based on a "public interest" test (D. br. 21-22). This is a misreading of the cases. Each one was decided under "the gun" or what the court believed was "the gun" of a Supreme Court majority. And until Gertz, the courts were right.

Every one of these decision that were rendered between Times v. Sullivan and Rosenbloom relied not upon some state policy or rule of law, but upon what the court assumed to be federal Constitutional law as interpreted by the Supreme Court in New York Times v. Sullivan and subsequent cases. See Garfinkel v. Twenty-First Century Publishing Co., 30 App. Div.2d 787, 291 N.Y.S. 2d 735 (1st Dep't 1968) (holds basketball is a matter of public interest; relies on Times v. Sullivan and Butts v. Curtis Publishing Co.); Lloyds v. United Press International, Inc., 63 Misc.2d 421, 423, 311 N.Y.S. 2d 373 (Sup. Ct. N.Y. Co. 1970) (cites federal cases and says these indicate both public figure and public interest require malice standard); Cohen v. New York Herald Tribune, Inc., 63 Misc.2d 87, 91, 310 N.Y.S. 2d 709, 714 (Sup. Ct. Kings Co. 1970) (cites Times v. Sullivan as requiring a "public interest" malice standard); Fotochrome, Inc. v. New York Herald Tribune, Inc., 61 Misc.2d 226, 305 N.Y.S. 2d 168 (Sup. Ct. Queens Co. 1969) (cites Times v. Sullivan, Butts and Time, Inc. v. Hill as basis for saying

fraud on stock market is matter of public interest and requires malice standard; also cites United Medical Lab. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), which interpreted New York Times, Butts, Hill, etc. as encompassing public interest utterances under malice standard); All Diet Food Distributors, Inc. v. Time, Inc., 56 Misc.2d 821, 290 N.Y.S. 2d 445 (Sup. Ct. N.Y. Co. 1967) (cites New York Times and Time, Inc. v. Hill as support for invocation of malice standard on issues of public interest).

In sum, all of the pre-Rosenbloom cases relied on by defendants for an independent New York State policy depend instead on an interpretation of Supreme Court cases that was eventually rejected in Gertz v. Welch.*

As a consequence, these cases decided between the decisions in Times v. Sullivan and Rosenbloom v. Metro-media, Inc. simply have no bearing on the current state of New York law. That must be determined by looking to the pattern of decisions from the New York Court of Appeals during the same period and in the 150 years prior to New York Times v. Sullivan.

*Even these cases did not represent the unanimous view of those lower New York courts that considered the issue. See Bavarian Motor Works, Ltd. v. Manchester, 61 Misc.2d 309, 305 N.Y.S.2d 593 (Sup. Ct. N.Y.Co. 1969) (rejecting application of malice standard to issue of public interest).

Defendants cite two recent decisions of the New York State Supreme Court that held New York's adoption of the "public interest" test is unchanged by Gertz v. Welch. Commercial Programming Unlimited v. CBS, Inc. ___ Misc.2d ___, N.Y.L.J., Vol. 173, No. 57, March 25, 1975, p. 2, col. 5 (Sup. Ct. N.Y. Co. 1975); Sarafets, Inc. v. Gannett Co., 80 Misc.2d 109, 361 N.Y.S.2d 276 (Sup. Ct. Broome Co. 1975).*

But these two cases were decided on the erroneous view, adopted by defendants, that the lower New York court cases decided between Times v. Sullivan and Rosenbloom rested on New York State policy and not on Constitutional mandate. As we have just shown, those cases were not based on a state public policy (pp. 15-16, supra). Moreover, in one of these two recent cases, the judge said that, while he could not anticipate what the New York Court of Appeals would do in light of Gertz, he agreed with

"plaintiff's argument based on the reasoning of the majority opinion in Gertz that private persons involved in matters of public or general interest who have been defamed are in a disadvantaged position to protect themselves or redress the wrong than are public officials or public figures who have ready access to the news media. Were it for us to decide, we would espouse some lesser standard as permitted in Gertz where private persons are defamed." Safarets, Inc. v. Gannett Co., 80 Misc.2d at 113.

*These two cases were decided subsequent to the submission of our main brief.

Since both of these cases rest upon a faulty premise and since both are expressions of lower New York courts that are inconsistent with the doctrinal pattern of the decisions of the New York Court of Appeals, they cannot be treated as the governing law of New York. See, e.g., Galella v. Onassis, 353 F.Supp. 196, 229 (S.D.N.Y. 1972), rev'd in part on other gds., 487 F.2d 986 (2d Cir. 1973) (this Court's dictum agrees with District Court on this point, 487 F.2d at 995 n. 12); Lykins v. Peoples Community Hospital, 355 F. Supp. 52 (E.D. Mich. 1973); Risher v. United States, 339 F.Supp. 484, 488 (S.D. Ala.), aff'd, 465 F.2d 1 (5th Cir. 1972) (citing Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967)).

At the very least, since both decisions are being appealed to the Appellate Division (in one case, argument has been noticed for May), if this Court has any question as to whether New York law subsequent to Gertz is unaffected by that decision, the most reasonable approach would be to remand this case to the District Court for reconsideration in light of what will shortly be a more definitive expression of the governing New York State law by the Appellate Division of the New York Supreme Court. See, e.g., United Artists Corp. v. Proskin, 363 F.Supp. 406 (N.D.N.Y. 1973) (3-judge court).

The Public Figure Argument*

For their second argument against remand, defendants urge that the malice standard applies to this case because plaintiff is a "public figure" and that Judge Gurfein in the District Court "did imply as much (D. br. p. 26)."

Not only did Judge Gurfein not decide the public figure issue or "imply as much", but it is plain, under the decisions of the Supreme Court cited in our main brief (pp. 19-20), that plaintiff cannot be regarded as a public figure on the record made so far. It is difficult to see, indeed, how he can ever be turned into such a figure even on a focused and complete record.

We have made this point in our main brief (pp. 19-22). We thought we had put at rest the notion that the present record establishes that plaintiff is of "pervasive fame" or "injected" himself into a matter of "public controversy."

Defendants say, however, that we are wrong and that plaintiff has thrust himself on the public like Sirhan Sirhan, Lee Harvey Oswald and Howard Hughes. They say plaintiff "became a public figure, whose close association with, if not membership in organized crime projected himself [sic] into the public spot light (D. br. 27.)"

*Answering Point II of defendants' brief (pp.26-29).

Plaintiff hasn't killed a President or a would-be President. He hasn't bribed a President or lifted submarines or made a fortune and used it for power or for wooing famous movie actresses. There is not the slightest indication in the record (and we dare say anywhere else) that plaintiff is generally known to the public or any good slice of the public. Whether or not, as defendants state (p. 27), plaintiff's "activities and the influence he had on Teresa and vice versa were ingredients necessary to a presentation about organized crime" (again a matter of hot factual dispute) is a question irrelevant to whether plaintiff is a public figure.

It would appear that whatever modicum of "fame" plaintiff has is due only to Teresa's book. And, as the Supreme Court has held and we have already remarked in our main brief, the defendant in a libel case cannot invoke the notoriety that he has brought upon his victim as a defense to that victim's libel cause of action. See Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966); Gertz v. Welch, supra.

The cases defendants cite in support of their public figure argument would establish only that plaintiff is not the sort of publicity-soaked figure that is required for an invocation of the malice standard (D. br. 28-29).

No big-time football coach, he; no author of books; no suspect in a \$1.5 million mail robbery.

Defendants cite and rely heavily on Jones v. Gates-Chili News, Inc., 78 Misc.2d 837, 352 N.Y.S.2d 649 (Sup. Ct. Monroe Co. 1974), which we discussed in our main brief (p. 21). The precise holding of that decision is hard to pin down, since the opinion refers to both "public figure" and "public interest" considerations and matters of "public record". But if we assume that the court was relying on the "public figure" rationale, the reasoning of the court in Jones is inapplicable here. The judge found, "Young Gary Jones [plaintiff] was a voluntary participant in a matter of public interest and concern***." 78 Misc.2d at 840. Whatever the basis for the judge's conclusion that the plaintiff in that case was a voluntary participant in the matter, that is not true here -- unless we assume the truth of the statements by Teresa that are the subject of the litigation and are denied by plaintiff.

Indeed, the Jones case destroys one peg for defendants' argument -- the claim that involvement in allegations of crimes makes a person a public figure per se (D. br. p. 27). At the conclusion of the Jones opinion, the court states that it is basing its holding on its prior decision in Vinci v. Gannett Co., 71 Misc.2d 146, 335 N.Y.S.2d 738 (Sup. Ct.

Monroe Co. 1972). In that case, plaintiff not only was charged with a crime but, in fact, pleaded guilty. In spite of this, the court virtually conceded that plaintiff was not really a public figure and went on to rely exclusively on the plurality holding of Rosenbloom v. Metro-media, Inc. -- that plaintiff was involved in a matter of "public interest." 71 Misc. 2d at 150-151.

And surely the public policy that encourages rehabilitation dictates that the commission of crimes not make one automatically and always "a public figure."

In sum, it is difficult to see how defendants will ever sweep plaintiff into the "public figure" bracket. The present record does not do it. At the very least, there is an issue of fact to be resolved as to the degree of publicity and notoriety that plaintiff had achieved, as a result of either his voluntary acts or his involuntary involvement in matters of public note, prior to publication of My Life in the Mafia. Such issues should not and cannot be thrust on this Court on the present papers. They are always best determined by a trial court. This case has to be remanded for determination of whether plaintiff is a public figure and whether defendants are entitled to rely, as a result, on a defense of lack of malice.

The Negligence and Malice Questions*

As we pointed out in our original brief (p. 22), if plaintiff is a private person then the issue of liability will hinge on some concept of negligence; that is, on a basis 'other than that of strict liability,' which was the law of New York prior to the New York Times case. See Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974).

Defendants do not even contest the fact that if negligence is the test, then this case must be remanded for trial unless this court concludes that plaintiff is "libel-proof." Defendants argue that Times v. Sullivan malice -- "knowledge that [the publication] was false or*** reckless disregard of whether it was false or not" -- is the only conceivable test and assert that as a matter of law they cannot be charged with malice (D. br. 30).

Our position remains that before the factual issues of malice or negligence can be determined, this case should be remanded for reconsideration in light of Gertz v. Welch. But as we demonstrated at length in our main brief (pp. 24-26), even if malice were the test, summary judgment would not be appropriate on the record. There are numerous and serious factual issues that remain in this case regardless of whether a negligence or a malice test is used.

*Answering Point III of defendants' brief (pp. 30-39).

Defendants' response is, as it was in their original motion papers, to praise themselves for their attempts to substantiate Teresa's tale while assiduously avoiding any specifics of how they did this. We review our position on each of the defendants to show how the record fails each on the issue of Times v. Sullivan-type malice.

Teresa

There is no way of determining whether or not Teresa acted with malice without deciding the truth or falsity of his allegations. If they are false, then he must necessarily have had knowledge that they were false since he claims he saw what happened or was told what happened by plaintiff. As reflected in the recent Supreme Court decision in Cantrell v. Forest City Publishing Co., 43 U.S.L.W. 4079 (U.S. Dec. 18, 1974), in such circumstances the question of malice is for the jury and cannot be bypassed by summary judgment. The efforts of Doubleday and Fawcett to check Teresa's reliability are of little or no consequence to Teresa's case since it is conceded that most of the information supplied by Teresa was not verified (Renner affidavit, S. 97).*

*Defendants make much of the fact that Teresa had personal knowledge of the events in question (D. br. 39). It is this very point that undermines their case. The issue is not whether Teresa knew the truth -- of course he did -- but whether he was telling the truth. On the present record, there is simply no way to determine whether he was telling the truth.

The District Court's opinion, in concluding that malice could not be established as to all defendants, at no time discusses how this can be so for Teresa. We submit that the only way in which the truth or falsity of Teresa's story can be judicially determined is at trial, with sworn testimony and live witnesses whose demeanor can be observed and thus when credibility can be weighed -- not on unsworn papers. About the only basis used by defendants for concluding that Teresa, as a matter of law, told the truth is that he has been used in prosecutions of various criminal defendants who were convicted. We hardly imagine that the rule of law will ever be that "successful" use of an informer in criminal prosecutions constitutes an absolute defense against libel actions for whatever he may say in his literary ventures. Moreover, we are sure that this Court has seen occasions where convictions have been secured despite the testimony of informers of Teresa's ilk.

Renner

As for Renner, the description of his efforts to verify the specific offending passages in the book is, to say the least, vague and conclusory. Renner himself concedes that he obtained no independent verification on most of Teresa's allegations (S. 97). With regard to Teresa's

other charges, Renner is consistently and disturbingly general as to his verification methods (S. 96-99); moreover, he never answered plaintiff's interrogatories, which were designed to elicit specific descriptions of his efforts at verification.

In view of both his failure to respond to the interrogatories and the vagueness of his recounting of how he went about checking on Teresa's story, it is hard to see how summary judgment could possibly be granted in his favor, even under the most stringent malice standard. It is harder still to imagine that he could work with Teresa as closely as he claims to have done (S. 95) and not know of Teresa's lying or indifference to lying, if in fact it is proved Teresa lied.*

*With regard to both Teresa and Renner, defendants go to a considerable effort to establish that there is no exception to the actual malice standard for defendant authors (D. br. 37). Their discussion is much beside the point we made. We never suggested that where a malice standard is appropriate -- that is, where the person libeled is a public figure or public official -- authors are excepted from this rule. The point actually made, a very obvious one in fact, was that the formulation of the malice test found in St. Amant v. Thompson, 390 U.S. 727 (1968), and Gertz v. Welch, supra, that there must be a "high degree of awareness *** of probable falsity," cannot be applicable to the author of the alleged falsehood who is stating "a fact" from personal knowledge. In such a case, if the fact is false then the author has lied either about the fact or, at the very least, about his knowledge of the fact. In this case, if Teresa's facts are wrong, then he lied; and if those facts that Renner claims to have substantiated, although he does not specifically say how, are false, then presumably he lied, at least as to those substantiation efforts that he claims to have made. Thus, it is evident that neither Teresa nor Renner can hide behind a claim that they lacked "a high degree of awareness *** of probable falsity."

Doubleday & Fawcett

With regard to Doubleday and Fawcett, we made the point in our main brief (p. 26) that the affidavits offered in support of those two publishing houses are simply too general to determine the nature of their efforts to substantiate Teresa's story. All we can say really is that they were alerted to the problem by counsel. Although defendants, in their brief now refer to a "description of [the] extensive and meticulous verification process which was employed by appellees prior to publication of MY LIFE IN THE MAFIA" (pp. 31-32), in fact the affidavits contain no real description of the verification process concerning the 15 offending passages and provide no means of determining whether it was "extensive" or "meticulous" or whether in fact it constituted a deliberate evasion on the part of publishers who well knew that what they were printing up was of dubious veracity. We don't know why the publishers would run away from details unless the details hurt.

Thus, for none of these defendants -- even if they prove right about the need to apply a malice test -- is this case ready for summary judgment in any court.

Plaintiff is not "Libel-Proof"*

Defendants say plaintiff is "libel-proof"; he can't recover because he's a convict. Thereby, they seek to establish a rule of law that a plaintiff who has been convicted of a serious crime is fair game for any sort of published falsehood -- despite the malice of author or publisher.

The short answer we give by posing several questions: Do not convicts have feelings? Do they not bleed? Is it not possible that they may be prejudiced before parole boards? Is it not possible that they may want some day to hold their heads higher among family and friends? What happens to the policy of rehabilitation under such a "fair-game" rule?

Defendants tell us that three decisions support their assertion that the present case is "frivolous" because plaintiff "is a habitual criminal whose record demonstrates a life devoted to crime (D. br. 40)."

Urbano v. News Syndicate Co., 358 F.2d 145 (2d Cir. 1966) (Lumbard, J., dissenting) ("Urbano No. 1"); Urbano v. Sondern, 41 F.R.D. 355 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir.), cert. denied, 386 U.S. 1034 (1966)

*Answering Point IV of defendants' brief (pp. 40-44).

("Urbano No. 2"); Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich. 1955). None of these three cases requires dismissal here or supports the broad rule urged by defendants.

Defendants rely on the dissenting opinion of Judge Lumbaro in Urbano No. 1. This Court, however, reversed on a conflict of law point in that case and remanded for further proceedings on a libel complaint that it declined to say was frivolous. Urbano No. 2 involved a dismissal of a complaint brought by the same plaintiff. The decision was affirmed by this Court in part on the opinion of the district judge. Plaintiff in the Urbano cases was a convicted murderer who had been sentenced to a life term and was suing with regard to an article published in the Readers Digest based upon an F.B.I. press release that had recounted a number of exploits from his career. The courts in Urbano No. 2 were impelled to dismissal by a panoply of considerations: (i) that the crimes attributed to Urbano in the article were far less serious than murder, (ii) that he had been convicted of the crime of murder and was serving a life sentence, (iii) that he could give no facts that might show that he did not commit the crimes alleged, despite having been given full opportunity to present a record, and (iv) that the article was based largely or entirely on the press release, which made

it unlikely that he could overcome the qualified privilege to report the activities of public officials. 370 F.2d at 14.

Similarly, in Mattheis v. Hoyt, plaintiff had been convicted of a brutal murder of a young girl and was suing with regard to an article that reported the fact of his conviction and additionally that he had admitted to his lawyer that he had committed the crime. Plaintiff did not even seek to challenge the justice of his conviction. Moreover, as the court pointed out, under Michigan law plaintiff was not eligible for parole since he had been convicted of first degree murder. Furthermore, since the crime to which the libelous article made reference was the very crime for which he had been convicted, plaintiff had no case in view of the common-law rule that "a charge imputing that one has been convicted of an offense, if there has been a conviction, is justified regardless of whether or not plaintiff was in fact innocent of the offense or whether or not the court had jurisdiction." 136 F.Supp. at 124, quoting 53 C.J.S., Libel and Slander, §37 at p. 227.

In distinction to these three cases, plaintiff is suing with regard to a series of allegations as to both serious and trivial crimes for which he has never been convicted, which inflict greater harm to his

reputation than the crime for which he was convicted and which may well prove damaging to his chances for parole. It is one thing to be a convict and another thing to be labeled an unregenerate member of the Mafia.

Appropriateness of Summary Judgment*

Finally, defendants suggest that a libel action is particularly appropriate for dismissal to avoid the chilling effect on First Amendment rights that lengthy litigation would create and that consequently dismissal was justified in this case. Defendants ignore important countervailing values and rules of law.

First, defendants' emphasis on the First Amendment rights of authors and publishers must be balanced against the equally important value of an individual's right to privacy and to freedom from public falsehoods that defame and sully his reputation. Indeed, it was the recognition of the vital interest in "compensating individuals for the harm inflicted on them by defamatory falsehood" that persuaded the Supreme Court to overrule Rosenbloom. Gertz v. Welch, supra, 418 U.S. at 341. The Court said (id.):

*Answering Point V of defendants' brief (pp. 44-46).

"the individual's right to the protection of his own good name

'reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.'"

Second, as is true in all instances of motions for summary judgment, the evidence on the record "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, 369 U.S. 654, 655 (1962). Plaintiffs have a Constitutional right to have factual issues resolved at a trial. Indeed, this Court has specifically admonished:

"The fact that the trial court believed it unlikely that the [party opposing the motion] would prevail at trial is insufficient to authorize summary judgment against him." Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

Third, in this case in particular, one of the material issues for decision -- regardless of whether the standard is negligence or malice -- involves matters of motive and intent, which have been deemed particularly inappropriate for decision by summary judgment. See

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Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). And, among such issues of intent and motive, the question of actual malice in a libel context has been singled out as a matter that should be left to trial. See Goldwater v. Ginzburg, 261 F.Supp. 784, 788 (S.D.N.Y. 1966), aff'd, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). As the court stated in the Goldwater case (261 F.Supp. at 788):

"The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings and reactions.' [Citing cases]"

See also Buckley v. Esquire, Inc., 344 F.Supp. 1133 (S.D.N.Y. 1972).

Thus, it appears that, in spite of defendants' suggestions to the contrary, the plaintiff in a libel action is not to be considered particularly vulnerable to motions for summary judgment. In this case there is no basis in the record for concluding that plaintiff's cause of action is frivolous; and if there are any questions as to the substantiality of the plaintiff's cause of action, this case should be remanded for the development of a more complete record. See, e.g., Scott Paper Co. v. Fort Howard Paper Co., 343 F.Supp. 229 (E.D. Wis. 1972) (denying summary judgment in trade libel case since plaintiff hadn't had suf-

ficient discovery); Herman v. Labor Cooperative Educational & Publishing Soc., 139 F.Supp. 35 (D.D.C. 1956) (summary judgment denied in defamation suit because of incomplete record on issues of truth, qualified privilege, etc.).

CONCLUSION

For the reasons given in our main brief and in this reply brief, this case should be remanded to the District Court for a redetermination of the motion for summary judgment and for further proceedings in light of the Supreme Court's decision in Gertz v. Welch; very substantial issues of law and fact appear in need of resolution before any or all defendants can secure a dismissal of this case.

Respectfully submitted,

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